Appeal Nos. 08-13652, 08-13653, 08-13657, 08-14921, & 08-16283 (consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FRIENDS OF THE EVERGLADES, FLORIDA WILDLIFE FEDERATION, SIERRA CLUB, ENVIRONMENTAL CONFEDERATION OF SOUTHWEST FLORIDA, MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, STATES OF NEW YORK, CONNECTICUT, DELAWARE, ILLINOIS, MAINE, MICHIGAN, MINNESOTA, MISSOURI, WASHINGTON, and PROVINCE OF MANITOBA, CANADA,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and its ADMINISTRATOR,

Respondents,

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, its EXECUTIVE DIRECTOR, and UNITED STATES SUGAR CORPORATION,

Intervenors-Respondents.

Petitions for Review of a Final Rule
of the United States Environmental Protection Agency

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October 27, 2011

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, to the best of undersigned counsel's knowledge, he certifies that the certificate of interested persons submitted by the States of New York, et al. on or about August 11, 2011, with their opening brief is complete.

Dated: 10/27/2011

___/s/ Andrew J. Doyle_____
ANDREW J. DOYLE, Attorney
United States Department of Justice
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STATEMENT REGARDING ORAL ARGUMENT

Respondents United States Environmental Protection Agency and its Administrator ("EPA"[1/]) request oral argument because they believe it would aid the Court's decisional process. Further, the Court's Order of May 6, 2011, provides that "[t]hese consolidated petitions shall be scheduled for oral argument after briefing is completed." Order at 5.[2/]

[1/] For a glossary of abbreviations used in this brief, see our addendum, tab A.

[2/] For a copy of the Order, see our addendum, tab B.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over these consolidated petitions for review of EPA's "Water Transfers Rule," 40 C.F.R. § 122.3(i), pursuant to Section 509(b)(1) of the Clean Water Act ("CWA" or the "Act"), 33 U.S.C. § 1369(b)(1). See infra pp. 19-36.

STATEMENT OF THE ISSUES

1. Does this Court have jurisdiction over the petitions for review pursuant to Section 509(b)(1) of the CWA, 33 U.S.C. § 1369(b)(1), as EPA informed the public when it promulgated the Water Transfers Rule?

2. Did this Court resolve the validity of the Water Transfers Rule in Friends of the Everglades v. South Florida Water Management District, 570 F.3d 1210 (11th Cir. 2009) ("Friends I"), rehearing en banc denied, 605 F.3d 962 (11th Cir.), cert. denied, 131 S. Ct. 643 (2010)?

3. To the extent that the Court did not resolve the validity of the Water Transfers Rule in Friends I, did EPA act lawfully and reasonably in promulgating it?

STATEMENT OF THE CASE

I. INTRODUCTION

Before the Court are consolidated petitions for review of the Water Transfers Rule, 40 C.F.R. § 122.3(i), a regulation promulgated by EPA under the Clean

Water Act clarifying the circumstances under which conveyances of water do not require a permit under the National Pollutant Discharge Elimination System ("NPDES"). "Generally speaking, the NPDES requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters." S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 102, 124 S. Ct. 1537, 1541 (2004). In Friends I,[3/] which involved pumping water from canals into a lake, this Court held that no NPDES permit was required pursuant to the Water Transfers Rule and deferred to the Rule because it reflected "a reasonable, and therefore permissible, construction" of the CWA. 570 F.3d at 1228. The Court stressed: "[u]nless and until the EPA rescinds or Congress overrides the regulation, we must give effect to it." Id.

In this case, in December 2010, EPA filed a motion for summary denial of the petitions for review, on the ground that the Water Transfers Rule is valid as a matter of law under Friends I. On May 6, 2011, the Court (Hull, Wilson, and Pryor, JJ.) denied EPA's motion, identifying a "jurisdictional issue . . . of first impression in this Circuit." Order at 4. That issue is whether Section 509(b)(1) of the CWA, 33 U.S.C. § 1369(b)(1), allows the Court to adjudicate the petitions on

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[3/] The abbreviation Friends I is used to avoid confusion with the present case, which has a similar caption.

the merits. As the Court observed, "other circuits have taken somewhat different approaches" regarding direct review of NPDES-related regulations in the courts of appeals. Order at 4 (citing Nat'l Cotton Council of Am. v. EPA, 553 F.3d 927, 932-33 (6th Cir. 2009), and Nw. Envtl. Advocates v. EPA, 537 F.3d 1006, 1015-18 (9th Cir. 2008)). The Court deferred consideration of jurisdiction, as well as the merits of the petitions for review, pending the submission of briefs. Order at 4-5.

II. STATUTORY AND REGULATORY BACKGROUND

Congress enacted the Clean Water Act , 33 U.S.C. §§ 1251-1387, to respond comprehensively, as a matter of national policy, to the complex problem of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C.§ 1251(a). The CWA recognizes the responsibilities of individual states to protect water quality and manage water resources, including "the authority of each State to allocate quantities of water within its jurisdiction." 33 U.S.C. § 1251(b) and (g). The CWA addresses the problem of water pollution through a multifaceted federal-state approach that includes provisions directed to research and related programs (Title I, 33 U.S.C. §§ 1251-1274), grants for construction of treatment works (Title II, 33 U.S.C. §§ 1281-1301), the establishment and enforcement of standards, including effluent and water-quality standards (Title III, 33 U.S.C. §§ 1311-1330), and the issuance of permits and

licenses (Title IV, 33 U.S.C. §§ 1341-1346).

Section 301(a) of the CWA prohibits "the discharge of any pollutant" except in compliance with other specified sections of the Act, including (as pertinent here) Section 402. 33 U.S.C. §§ 1311(a) and 1342. The Act defines the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). The term "navigable waters," in turn, is defined to mean "the waters of the United States." 33 U.S.C. § 1362(7).

Section 402 of the CWA establishes the NPDES permit program, under which EPA or a qualifying state "may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding [Section 301(a) of the Act]," so long as the discharge satisfies specified requirements. 33 U.S.C. § 1342(a)(1). NPDES permits typically impose limitations on point source discharges by establishing permissible rates, concentrations, or quantities of specified constituents at the points where the discharge streams enter the waters of the United States. See 33 U.S.C. § 1342(a)(1) and (2); see generally 40 C.F.R. Pts. 122 and 125; see also, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 174, 176; 120 S. Ct. 693, 701 (2000).

The CWA does not impose permit requirements for discharges from non-point sources such as runoff. Instead, the Act encourages the states to develop local programs, which may include techniques such as land-use requirements, to control non-point sources of pollution. See, e.g., 33 U.S.C. §§ 1288(b)(2)(F), 1314(f), and 1329.

The CWA creates a bifurcated jurisdictional scheme in which original jurisdiction over certain claims against EPA is vested in the district courts (e.g., "mandatory duty" suits), while original jurisdiction over other claims against EPA lies solely in the circuit courts of appeal. 33 U.S.C. §§ 1365(a) and 1369(b)(1); Chemical Mfrs. Ass'n v. EPA, 870 F.2d 177, 265-66 (5th Cir. 1989); American Frozen Food Inst. v. Train, 539 F.2d 107, 124-26 (D.C. Cir. 1976); Central Hudson Gas & Elec. Corp. v. EPA, 587 F.2d 549, 555 (2d Cir. 1978). Section 509(b)(1) sets forth rulemaking and other actions of EPA that are reviewable in the first instance in the courts of appeals, including EPA's actions:

> (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, [and]
> (F) in issuing or denying any permit under section 1342 of this title[.]

33 U.S.C. § 1369(b)(1)(E) and (F); see Save the Bay, Inc. v. EPA, 556 F.2d 1282, 1291 (5th Cir. 1977).

III. PRECEDENTIAL AND PROCEDURAL BACKGROUND

In 2002, this Court first addressed the question of whether an NPDES permit is required for a conveyance of water from one body of navigable waters to another. Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist., 280 F.3d 1364, 1368 (11th Cir. 2002), vacated, 541 U.S. 95 (2004).[4] There, in the context of pumping water from a canal to a water conservation area within the Everglades ecosystem, the Court affirmed the entry of summary judgment for the plaintiffs; the Court held that an NPDES permit was required because the pump was moving water from the "outside world," i.e., the canal, into a meaningfully distinct water body, i.e., the water conservation area. 280 F.3d at 1368-69. The Court declined to adopt the following construction of the CWA advanced by the South Florida Water Management District: "no addition of pollutants can occur unless pollutants are added from the outside world insofar as . . . the outside world cannot include another body of navigable waters." 280 F.3d at 1368 n.4. However, as the Court noted, the United States was not a party, and EPA had not articulated a position on the question of statutory construction at hand. 280 F.3d at 1367 n.5.[5]

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[4] "[T]ransferred (and receiving) water will always contain intrinsic pollutants." 73 Fed. Reg. 33,697, 33,701 (June 13, 2008) (citation omitted).

[5] The Court's decision in Miccosukee accorded with decisions from other circuits (continued...)

On certiorari, the Supreme Court vacated and remanded the Court's judgment on the ground that the record lacked adequate support, for purposes of summary judgment, for the conclusion that the water conservation area was meaningfully distinct from the canals. Miccosukee, 541 U.S. at 112, 124 S. Ct. at 1547.[6] The Court acknowledged the argument of the United States, participating as amicus curiae, that the CWA's language and structure, as well as EPA's longstanding practice, establish that the transfer of water from one body of navigable waters to another without alteration or an intervening use is not an addition of pollutants to the waters of the United States that Congress intended to

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[5](...continued)
at that time. Catskill Mountains Ch. of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481, 491 (2d Cir. 2001) ("[T]he transfer of water containing pollutants from one body of water to another, distinct body of water is plainly an addition and thus a 'discharge' that demands an NPDES permit."); Dubois v. U.S. Dep't of Agric., 102 F.3d 1273, 1296 (1st Cir. 1996) ("[T]here is no basis in law or fact for the district court's 'singular entity' theory.").

[6] The Court took it as a given that no NPDES permit is required to convey water within a single water body. Miccosukee, 541 U.S. at 109-10, 124 S. Ct. at 1545-46. Accord Nat'l Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580, 581 (6th Cir. 1988) (holding that no NPDES permit was required for a hydroelectric facility that drew water from Lake Michigan into a man-made impoundment above a dam and generated power by discharging the lake water back into the lake through the dam's turbines, stating that the "facility's movement of pollutants already in the water is not an 'addition' of pollutants to navigable waters of the United States"); Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 161, 174-77 (D.C. Cir. 1982) (holding that no NPDES permit was required for the release of water from a dam).

subject to the NPDES program. Miccosukee, 541 U.S. at 104, 106, 124 S. Ct. at 1542, 1544 (referring to the argument as "unitary waters"). However, the Court noted the absence of "any administrative documents in which EPA has espoused that position." 541 U.S. at 107, 124 S. Ct. at 1544. Ultimately, the Court did not pass on the United States' argument and left it open for consideration on remand. 541 U.S. at 109, 112, 124 S. Ct. at 1545, 1547.

In May 2005, the United States intervened in Friends I, then pending before the United States District Court for the Southern District of Florida. Friends of the Everglades v. S. Fla. Water Mgmt. Dist., No. 02-80309-Civ., 2006 WL 3635465, at * 2 (S.D. Fla. Dec. 11, 2006), rev'd in part, dismissed in part, 570 F.3d 1210 (11th Cir. 2009).[7/] In a motion for summary judgment, the United States urged the district court to defer to an August 2005 memorandum issued by EPA interpreting the CWA as not requiring an NPDES permit for the mere transfer of water from one body of navigable waters to another. See 73 Fed. Reg. at 33,699 (summarizing the interpretative memorandum); Administrative Record ("AR") # EPA-HQ-OW-

[7/] The United States also sought to intervene in Miccosukee on remand, but withdrew its motion after it became clear that the related case of Friends I would be resolved first. See generally Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist., 559 F.3d 1191, 1193-94 (11th Cir. 2009) (discussing the district court's stay of further proceedings). Miccosukee was stayed pending Friends I and remains stayed pending resolution of the petitions for review of the Water Transfers Rule.

2006-0141-0005 (August 2005 interpretive memorandum).[8/] The motion was denied, and a trial ensued.

In June 2006, EPA proposed to codify its interpretation of the CWA set forth in the August 2005 memorandum. 71 Fed. Reg. 32,887 (June 7, 2006). In the proposal, EPA stated: "This proposed rule is based on the legal analysis contained in the interpretative memorandum and explained below." 71 Fed. Reg. at 32,889. EPA provided the public with an opportunity to comment. Id. at 32,887, 32,892.

In December 2006, the district court issued a decision and concluded that operating the pumps without an NPDES permit violated the CWA. Friends I, 2006 WL 3635465, at * 48. The court held that the CWA "unambiguous[ly]" requires an NPDES permit for a transfer of water from one body of navigable waters to another, even if the pump or other transfer facility does not alter or put the water to an intervening use. Id. The court found it unnecessary to determine the level of deference to accord EPA's interpretation of the CWA, as espoused in the interpretative memorandum and proposed rule, because it concluded that Congress clearly intended to require NPDES permits for water transfers. Id. at *47-48. The district court further found, based on the evidence presented at trial, that the lake was meaningfully distinct from the canals. Id. at *48-50. The United States,

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[8/] Subsequent administrative record items are cited by the final four numbers.

among other parties, appealed.

In June 2008, EPA finalized and promulgated the Water Transfers Rule. The Rule provides that a water transfer —formally defined by the Rule as "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use"— does not require an NPDES permit. 40 C.F.R. § 122.3(i); 73 Fed. Reg. at 33,697. While the Rule expressly excludes water transfers from the NPDES permit program, it provides that the exclusion "does not apply to pollutants introduced by the water transfer activity itself to the water being transferred." 40 C.F.R. § 122.3(i). The preamble set forth EPA's basis for promulgating the Rule, which rested on its legal interpretation of the CWA and longstanding practice. 73 Fed. Reg. at 33,700-03. EPA also responded to comments from the public, id. at 33,698, 33,703-06, and prepared a "Comment Response Document," AR 1428, to complement and supplement the preamble. 73 Fed. Reg. at 33,698.

EPA informed the public, in the preamble to the final Rule, that "[u]nder section 509(b)(1) of the Clean Water Act, judicial review of the Administrator's action can only be had by filing a petition for review in the United States Court of Appeals within 120 days after the decision is . . . issued[.]" 73 Fed. Reg. at 33,697. Shortly thereafter, ten petitions for review were filed in various circuits. Pursuant

to 28 U.S.C. § 2112(a)(3), this Court was randomly selected to consider all of them. Order of the Judicial Panel on Multidistrict Litigation (July 22, 2008).[9/] The Court then consolidated the petitions and stayed further proceedings in this case pending a decision and mandate in Friends I. Order of Nov. 14, 2008.[10/]

In June 2009, this Court issued a decision in Friends I, reversing the district court's judgment that transferring water from the canals to the lake violated the CWA in the absence of an NPDES permit. In light of EPA's intervening promulgation of the Water Transfers Rule, the Court applied the familiar two-step framework described in Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 2781-82 (1984), to determine whether water transfers require NPDES permits. Friends I, 570 F.3d at 1218-20.[11/]

[9/] For a copy of the Order of the Multidistrict Litigation Panel, see our addendum, tab C. Many of the petitioners also sought judicial review of the Water Transfers Rule in district courts in Florida and New York. Those cases have been stayed pending resolution of the present case. See Catskill Mountains Ch. of Trout Unlimited, Inc. v. EPA, 630 F. Supp. 2d 295, 304 n.6, 307 n.8, 308 (S.D.N.Y. 2009) (discussing stays entered in both cases).

[10/] For a copy of the Court's Stay Order, see our addendum, tab D.

[11/] Chevron governs any challenge to an agency's interpretation of a statute that Congress has entrusted the agency to administer. Under Chevron, the first question is "whether Congress has directly spoken to the precise question at issue." Id. at 842, 104 S. Ct. at 281. If so, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. at 842-43. If, however, "the

(continued...)

At step one of its Chevron analysis, the Court applied "the traditional tools of statutory construction," including an examination of the CWA's text, structure, purpose, and legislative history, and determined that there are two reasonable interpretations of the term "any addition . . . to navigable waters" as applied to water transfers. Friends I, 570 F.3d at 1222-27. Under one interpretation, the Court stated, the term means "any addition . . . to [any] navigable waters," such that a water transfer constitutes a discharge because it adds a pollutant to the receiving body of water. Id. at 1227 (brackets in original). Under the other interpretation, the Court stated, the term means "any addition . . . to navigable waters [as a whole]," such that a water transfer does not constitute a discharge because the pollutant is already in the waters of the United States. Id. (brackets in original). The Court concluded that both interpretations are plausible and that the statute therefore is ambiguous on the question whether a water transfer is a "discharge of a pollutant" that requires an NPDES permit. Id.

[11/](...continued)
statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. at 843. Under that second step, "[i]f a statute is ambiguous, and if the implementing agency's construction is reasonable, Chevron requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980, 125 S. Ct. 2688, 2699 (citing Chevron, 467 U.S. at 843-44 & n.11, 104 S. Ct. at 281).

Proceeding to step two of Chevron, the Court held that the Water Transfers Rule is based on a permissible construction of the statute and thus controlling. Friends I, 570 F.3d at 1227-28. "Because the EPA's construction is one of the two readings we have found is reasonable," the Court explained, "we cannot say that it is 'arbitrary, capricious, or manifestly contrary to the statute.'" Id. (quoting Chevron, 467 U.S. at 844, 104 S. Ct. 2782). The Court further stated that, "[u]nless and until the EPA rescinds or Congress overrides the regulation, we must give effect to it." Friends I, 570 F.3d at 1228.

In May 2010, the Court denied suggestions for rehearing en banc. 605 F.3d 962 (11th Cir. 2010). In November 2010, the Supreme Court denied petitions for a writ of certiorari. 131 S. Ct. 643, 645 (2010). This Court then issued its Order of May 6, 2011, denying EPA's motion for summary denial of the petitions for review and establishing a briefing schedule. See supra pp. i, 2-3 & i n.2.[12/]

[12/] Five (of ten) petitions have been voluntarily withdrawn (Appeal Nos. 08-14247, 08-14471, 08-16270, 08-17189, and 09-10506). The remaining petitioners filed three opening briefs in August 2011. See "Corrected Initial Brief [for] Friends of the Everglades, Florida Wildlife Federation, Sierra Club, and Environmental Confederation of Southwest Florida" (Aug. 26, 2011) ("Friends of the Everglades Br."); "Initial Brief of Petitioner Miccosukee Tribe of Indians of Florida" (Aug. 13, 2011) ("Tribe Br."); "Brief for States of New York, Connecticut, Delaware, Illinois, Maine, Michigan, Minnesota, Missouri, Washington, and Government of the Province of Manitoba, Canada" (Aug. 11, 2011) ("States Br.").

STANDARD OF REVIEW

With respect to jurisdiction, EPA informed the public that, pursuant to Section 509(b)(1) of the CWA, 33 U.S.C. § 1369(b)(1), review of the Water Transfers Rule could only be had by filing a petition for review in the United States Courts of Appeals. 73 Fed. Reg. at 33,697. Although the Court generally does not owe controlling deference to EPA's statements to the public regarding jurisdiction, in cases of statutory ambiguity, where the jurisdictional questions involve the complex interplay of a number of statutory provisions and definitions, the construction adopted by the agency charged with the statute's administration is entitled to some deference. See Halogenated Solvents Indus. Alliance v. Thomas, 783 F.2d 1262, 1265 (5th Cir. 1986) (holding that EPA's interpretation of the Safe Drinking Water Act's statutory scheme, which ultimately affected the Court's holding on the jurisdictional issue, "is entitled to some deference"). In the present case, Section 509(b)(1) includes terms specific to the Clean Water Act, including "other limitation under section [301, 302, 306 and 405 of the Act]," and what actions are akin to issuance or denial of a permit. 33 U.S.C. § 1369(b)(1)(E) and (F).

With respect to the merits, the Court is bound to apply the "prior panel" rule. See United States v. Hogan, 986 F.2d 1364, 1369 (11th Cir. 1993) ("[I]t is the

firmly established rule of this Circuit that each succeeding panel is bound by the holding of the first panel to address an issue of law, unless and until that holding is overruled en banc, or by the Supreme Court.").

To the extent that any merits issues remain after application of the prior panel rule, the judicial review provision of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, provides the standard of review. E.g., Citizens Coal Council v. EPA, 447 F.3d 879, 889 (6th Cir. 2006) (en banc) ("The EPA promulgated the Final Rule [under the CWA] through informal rulemaking. The scope of our review over the informal rulemaking process is generally governed by . . . 5 U.S.C. § 706(2) (1996)."). Review under the APA is "exceedingly deferential" to the agency. Sierra Club v. Van Antwerp, 526 F.3d 1353, 1359-60 (11th Cir. 2008) (citation omitted). The APA provides, in pertinent part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law . . . . The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . . In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706. The essence of review under the APA is that "[a] reviewing court

reviews an agency's reasoning to determine whether it is arbitrary or capricious, or, if bound up with a record-based factual conclusion, to determine whether it is supported by substantial evidence." Dickinson v. Zurko, 527 U.S. 150, 164, 119 S. Ct. 1816, 1823 (1999) (internal quotation marks omitted).

SUMMARY OF ARGUMENT

This Court has jurisdiction over the petitions for review pursuant to Section 509(b)(1) of the CWA, 33 U.S.C. § 1369(b)(1). EPA urges the Court to follow the approach taken by other circuit courts in recognizing that original jurisdiction to review EPA regulations addressing the scope of NPDES permitting requirements, and NPDES permitting procedures, lies in the circuit courts of appeal. See, e.g., Nat'l Cotton Council, 553 F.3d at 932-33 (new rule exempting the discharge of certain pesticides from NPDES permit requirements, as codified at 40 C.F.R. § 122.3(h), was a regulation of the underlying permitting procedures, and thus the court of appeals had jurisdiction under § 1369(b)(1)(F) to review the rule).[13/]

Under CWA Section 509(b)(1)(F), the circuit courts' original jurisdiction applies to permit issuances and denials, as well as to regulations relating to permitting itself. Following the precedent set by the Supreme Court in Crown

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[13/] This summary of Nat'l Cotton Council is taken verbatim from this Court's Order of May 6, 2011 (p. 4).

Simpson Pulp Co. v. Costle, 445 U.S. 193, 196, 100 S. Ct. 1093, 1094-95 (1980), circuit courts have long applied a practical construction to Section 509(b)(1)(F) in recognizing their statutory authorization under Section 509(b)(1)(F) to review EPA-promulgated rules that regulate the underlying permit procedures. This Court is thus granted original jurisdiction to review the Water Transfers Rule, which reflects EPA's interpretation of what is not an "addition . . . to navigable waters," 33 U.S.C. § 1362(12)(A).

This Court's jurisdiction is further founded on CWA Section 509(b)(1)(E), which grants circuit courts original jurisdiction to review EPA actions "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 [Sections 301, 302, 306 or 405 of the CWA]." 33 U.S.C. § 1369(b)(1)(E). Pursuant to Section 509(b)(1)(E), circuit courts have original jurisdiction over actions closely related to the approval or promulgation of effluent limitations or other limitations. The Water Transfers Rule relates to "other limitations" because the Rule sets forth limits on which movements of water are not subject to NPDES permitting. The Rule likewise sets limits on permit issuers with respect to their authority to require permits.

Any ambiguity in the judicial review provisions of Section 509(b)(1) must be resolved in favor of circuit court review, Florida Power & Light Co. v. Lorion,

470 U.S. 729, 744-45; 105 S. Ct. 1598, 1607 (1985), especially in cases involving rules with national implications. Such resolution prevents inconsistent decisions by multiple district courts (and by multiple circuit courts on appeal).

On the merits, the Water Transfers Rule is valid under Friends I. As State Petitioners correctly concede, "the Court is bound by its ruling in [Friends I] that the Water Transfers Rule is a permissible construction of the Act." States Br. at 14. Moreover, Friends I resolved all material challenges to the Water Transfers Rule, contrary to the contention of Friends of the Everglades and the Tribe. EPA's rationale for promulgating the Rule rested on its legal interpretation of the CWA, particularly the operative statutory phrase "addition of any pollutant to navigable waters." 33 U.S.C. § 1362(12)(A). See, e.g., Friends I, 570 F.3d at 1227 ("EPA's regulation . . . accepts the unitary waters theory that transferring pollutants between navigable waters is not an 'addition . . . to navigable waters[.]'"); 73 Fed. Reg. at 33,699 ("Through today's rule, the Agency concludes that water transfers, as defined by the rule, do not require NPDES permits because they do not result in the 'addition' of a pollutant."). Under the APA, courts need only examine portions of the administrative record "[t]o the extent necessary to decision[.]" 5 U.S.C. § 706. In Friends I, the Court considered and addressed portions of the record necessary to review, and uphold, EPA's legal rationale and thus the Rule itself.

Because EPA's reasoning in support of the Water Transfers Rule was not bound up with any record-based factual conclusions, Petitioners' record-related arguments are immaterial. Regardless, the record shows that EPA adequately responded to comments and acted lawfully and reasonably in promulgating the Water Transfers Rule.

ARGUMENT

I. THIS COURT HAS JURISDICTION PURSUANT TO SECTION 509(b)(1) OF THE CLEAN WATER ACT, 33 U.S.C. § 1369(b)(1)

As noted above, Section 509(b)(1) of the CWA grants original jurisdiction to the federal courts of appeals over suits challenging EPA's actions:

> (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, [and]
> (F) in issuing or denying any permit under section 1342 of this title[.]

33 U.S.C. § 1369(b)(1)(E) and (F); see Save the Bay, 556 F.2d at 1291. Section 509(b)(1) was designed to "establish a clear and orderly process for judicial review" of key EPA decisions implementing the CWA. H.R. Rep. No. 92-911, at 136 (1972). Here, EPA's interpretation of the CWA– that effluent and/or other limitations imposed by NPDES permits do not apply to "water transfers" as defined under the Rule– is a decision with national implications. "[N]ational

uniformity . . . is best served by initial review in a court of appeals." NRDC v. EPA, 673 F.2d 400, 405 & n.15 (D.C. Cir. 1982) (finding "the case for first-instance judicial review in a court of appeals is stronger for broad, policy-oriented rules"). In addition, as in this case, multiple petitions can be consolidated in one circuit court under 28 U.S.C. § 2112(a). See, e.g., Nat'l Pork Producers Council v. EPA, 635 F.3d 738 (5th Cir. 2011); Nat'l Cotton Council of Am. v. EPA, 553 F.3d 927; Riverkeeper, Inc. v. EPA, 358 F.3d 174, 183, 185-86 (2d Cir. 2004).[14/] If the Court were to conclude that it did not have jurisdiction, there would be the very real possibility that different district courts could reach different conclusions regarding the Water Transfers Rule, "with the attendant risk of inconsistent decisions initially and on appeal." NRDC, 673 F.2d at 405 n.15.

As set forth below, Section 509(b)(1) of the CWA authorizes review of the Water Transfers Rule in this Court, and only in this Court.

[14/] A party in district court may file a motion to transfer a case. 28 U.S.C. § 1404(a). If the motion is granted, the party could then file a motion to consolidate actions before the same court that involve common questions of law. Fed. R. Civ. P. 42(a). However, those actions are left to the discretion of the district courts hearing such motions. Thus, there is no assurance that transfer and consolidation of multiple challenges to a rule of national uniformity, such as the rule at issue here, would be so consolidated. In contrast, multiple petitions for review of the Water Transfers Rule filed in multiple circuit courts have been consolidated under the requirements of 28 U.S.C. § 2112(a).

A. Review Lies in this Court under Section 509(b)(1)(F), Relating to the Issuance or Denial of a Permit

Pursuant to Section 509(b)(1)(F), persons seeking to challenge an EPA action "in issuing or denying any permit under section 1342 [Section 402 of the CWA]" may file a petition for review only in the circuit courts of appeals. 33 U.S.C. § 1369(b)(1)(F). As described below, the circuit courts' original jurisdiction applies to permit issuances and denials, and also extends to regulations relating to permitting itself. The regulation at issue here relates to and implements the NPDES permitting program by distinguishing between the types of water movements through point sources that may require permits (for example, transfers of non-waters of the United States into waters of the United States, or transfers involving intervening industrial, municipal, or commercial use) and those that do not require permits (for example, transfers of waters of the United States that keep the water free of intervening industrial, municipal, or commercial use). 40 C.F.R. § 122.3(i) (identifying water transfers as excluded from the NPDES permit program, except for those transfers that subject the transferred water to intervening industrial, municipal, or commercial use); see also 73 Fed. Reg. at 33,704-06 (providing examples of transfers of water that would require an NPDES permit, and those that would not).

Courts have given Section 509(b)(1) a "practical rather than a cramped construction." NRDC, 673 F.2d at 405. For example, courts have long recognized that initial review of actions "functionally similar" to the issuance or denial of a NPDES permit should be in the circuit courts. See Crown Simpson, 445 U.S. at 196, 100 S. Ct. at 1094. In Crown Simpson, the Supreme Court found that initial review of EPA's veto of a permit proposed by the state permitting authority should be in the circuit courts, even though the veto was not a "denial" of a permit per se. Id. at 196-97.[15/] The Supreme Court's decision was premised on the fact that if EPA, rather than the state in question, were the permitting authority, EPA's opposition would have resulted in a denial. Id. It disagreed with the circuit court below, which had held it lacked jurisdiction based on a narrow reading of the "'clear and unmistakable language'" of Section 509(b)(1)(F). See Crown Simpson Pulp Co. v. Costle, 599 F.2d 897, 903 (9th Cir. 1979) (quoting Washington v. EPA, 573 F.2d. 583, 587 (9th Cir. 1978)), rev'd, 445 U.S. 193 (1980). The Supreme Court declined to "read the Act as creating such a seemingly irrational bifurcated system" that would require litigants to go first to district court, which

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[15/] Cf. Exxon Corp. v. Train, 554 F.2d 1310, 1315-16 (5th Cir. 1977) (finding that EPA's objection to modification of an existing permit should be heard first in the circuit courts, under Section 509(b)(1)(F)); Texas Mun. Power Agency v. EPA, 836 F.2d 1482, 1484-85, 1486 n.14 (5th Cir. 1988) (same).

would cause delays and thereby frustrate Congress's goal of promptly resolving disputes under the CWA. Crown Simpson, 445 U.S. at 197, 100 S. Ct. at 1095.

Consistent with Crown Simpson, circuit courts have recognized their statutory authorization under Section 509(b)(1)(F) to review EPA-promulgated rules that regulate the underlying permit procedures. In American Mining Congress v. EPA, the Ninth Circuit exercised original jurisdiction over a petition for review of an EPA stormwater discharge rule that specified that discharges from certain inactive mines were not subject to NPDES permitting. 965 F.2d 759, 763 (9th Cir. 1992). In examining the threshold issue of jurisdiction, the court stated that Section 509(b)(1)(F) "allows us to review the regulations governing the issuance of permits under section 402 . . . as well as the issuance or denial of a particular permit." Id. (emphasis added). Indeed, the Ninth Circuit has repeatedly relied on Section 509(b)(1) in finding it had jurisdiction to review NPDES permitting regulations. See, e.g., NRDC v. EPA, 526 F.3d 591, 601 (9th Cir. 2008) (recognizing the court's original jurisdiction to review an EPA rule that exempted discharges of oil and gas construction activities from NPDES permitting under Section 509(b)(1)(F), which "authorizes appellate review of EPA rules governing underlying permit procedures") (citation omitted); Envtl. Def. Ctr., Inc. v. EPA, 344 F.3d 832, 843 (9th Cir. 2003) (recognizing the court's jurisdiction under

Section 509(b)(1) to review rule specifying which municipal separate storm sewer systems and stormwater discharges are and are not subject to NPDES permitting); NRDC v. EPA, 966 F.2d 1292, 1296-97, 1304-06 (9th Cir. 1992) (asserting jurisdiction under Section 509(b)(1)(F) to review a stormwater discharge rule that exempted from NPDES permit requirements various types of "light industry," construction sites less than five acres in size, and certain oil and gas activities, based on the court's "power to review rules that regulate the underlying permit procedures").

As this Court noted in its Order of May 6, 2011, the Ninth Circuit recently took a narrower view of Section 509(b)(1)(F) in Northwest Environmental Advocates v. EPA, a case involving EPA's rule that exempted certain ballast water and other vessel discharges from NPDES permitting. 537 F.3d 1006 (9th Cir. 2008).[16/] In finding that it did not have original jurisdiction to review EPA's ballast water rule, the Ninth Circuit endeavored to distinguish its earlier precedent. First, the court found American Mining inapplicable on the grounds that the challenge to

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[16/] Friends of the Everglades appear to acknowledge that the Ninth Circuit's Northwest Environmental Advocates decision is at odds with the court's earlier precedent. See Friends of the Everglades Br. at 35-36 (describing earlier Ninth Circuit case law as applying the "functionally related" test). Neither the Tribe nor State Petitioners acknowledge or address the Ninth Circuit's decisions predating Northwest Environmental Advocates.

the regulation in that case was that the exemption was too narrow (i.e., that the petitioner would have to seek a permit) rather than too broad. Id. at 1017. However, this approach conflicts with the Ninth Circuit's own precedent, which broadly asserted the court's original jurisdiction to review NPDES permitting regulations and made no distinction as to the breadth of the challenged exemption. The court's approach oddly suggests that circuit courts' original jurisdiction to review regulations that specify certain discharges that do not need an NPDES permit varies depending on the whether regulation is challenged as too narrow or too broad.

Such an approach is contrary to the statutory language and the intent of the judicial review provision of Section 509(b)(1)(F), neither of which condition jurisdiction on the identity of the petitioner or the basis of the challenge. Indeed, the notion that an exclusion is somehow distinct from a regulatory provision defining what activities are covered by the permitting requirements is irrational. To so hold creates a nonsensical bifurcated system of review that depends on whether or not EPA requires permits for a particular discharge. See Crown Simpson, 445 U.S. at 196-97, 100 S. Ct. at 1095 (rejecting an irrational review system).

The Northwest Environmental Advocates court also endeavored to distinguish the ballast water rule from rules reviewed by that court in the NRDC stormwater discharge rule cases on the basis that the stormwater rules were somehow different (and therefore reviewable by the circuit courts) because the stormwater rules were a clarification of an existing, statutorily-mandated exemption from permitting. Nw. Envtl. Advocates, 537 F.3d at 1017 (citing 33 U.S.C. § 1342(*l*)(2)). Yet the court failed to explain how this distinction should control whether a rule providing that certain discharges do not require a NPDES permit is reviewable by the circuit courts under Section 509(b)(1)(F).

At any rate, like the stormwater rules reviewed in the NRDC cases, the Water Transfers Rule reflects EPA's interpretation of the statutory phrase "addition . . . to navigable waters," 33 U.S.C. § 1362(12)(A). See, e.g., Friends I, 570 F.3d at 1227 ("EPA's regulation . . . accepts the unitary waters theory that transferring pollutants between navigable waters is not an 'addition . . . to navigable waters[.]'"); 73 Fed. Reg. at 33,699 ("Through today's rule, the Agency concludes that water transfers, as defined by the rule, do not require NPDES permits because they do not result in the 'addition' of a pollutant."). The Water Transfers Rule defines more precisely those discharges that do, and do not, constitute "additions" necessitating NPDES permitting. 40 C.F.R. § 122.3(i); 73 Fed. Reg. at 33,704-05,

33,708. The Rule's preamble provides examples of activities that fall outside the Rule (i.e., activities subject to NPDES permitting), such as where water is withdrawn from a water of the United States for use as cooling water or drinking water, or where a water transfer facility introduces a pollutant into the water being transferred. 73 Fed. Reg. at 33,704-05. The preamble also provides examples of activities that are generally not subject to NPDES permitting, such as hydroelectric operations and movements of water through dams or reservoir systems. Id. at 33,705. Thus, even under the Ninth Circuit's recent narrowing of its earlier interpretation of Section 509(b)(1)(F), original jurisdiction to review the Water Transfers Rule is in circuit courts of appeals.

In National Cotton Council of America v. EPA, 553 F.3d 927 (6th Cir. 2009), the Sixth Circuit issued the most recent decision addressing subject matter jurisdiction under Section 509(b)(1)(F) in the context of a regulation defining the scope of NPDES permitting requirements. That closely analogous case involved consolidated petitions for review of a final rule issued by EPA that provided that the direct application of pesticides to waters of the United States in accordance with the Federal Insecticide, Fungicide, and Rodenticide Act were exempt from NPDES permitting requirements. As in the present case, the environmental interest petitioners argued that the circuit court did not have jurisdiction to review the rule

under Section 509(b)(1)(F). Id. at 932-33. The Sixth Circuit found that Section 509(b)(1)(F) authorizes the courts of appeals "to review the regulations governing the issuance of permits under [S]ection 402 . . . as well as the issuance or denial of a particular permit." Id. at 933 (citing American Mining, 965 F.2d at 763 and NRDC, 966 F.2d at 1296-97). Thus, the National Cotton Council court concluded– in the context of a challenge to an EPA rule that, like the Water Transfers Rule, addresses when NPDES permits would not be required under Section 402– that "at a minimum, [Section 509(b)(1)(F)] encompasses the action before us." Nat'l Cotton Council , 553 F.3d at 933 (emphasis added).[17/]

In addition to the Sixth and Ninth Circuits, other courts of appeals have exercised original jurisdiction over challenges to NPDES permitting regulations, including those that specify which discharges are exempt from permitting. The

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[17/] State Petitioners are mistaken in their assertion (States Br. at 22) that the National Cotton Council court failed to take into account the arguments advanced in Northwest Environmental Advocates. The Sixth Circuit was fully briefed on the district court decision and the arguments before the Ninth Circuit. See Final Opening Brief of Envtl. Petitioners, Nat'l Cotton Council v. EPA, No. 06-4630, 2007 WL 5117920, at *1, 2-3(6th Cir. Dec. 26, 2007) (environmental petitioners' brief, referencing their motion to dismiss on jurisdictional grounds). Moreover, the Northwest Environmental Advocates decision was issued six months before the Sixth Circuit's opinion, and nearly fourteen months before the Sixth Circuit denied rehearing and rehearing en banc. Like this Court, the Sixth Circuit specifically chose to address this important jurisdictional question as part of merits briefing. Id.

Second Circuit exercised original jurisdiction to hear consolidated challenges to EPA's Concentrated Animal Feeding Operations ("CAFO") Rule, which set forth NPDES permitting requirements, including provisions requiring CAFOs of a certain size to seek a permit, provisions setting forth a process to allow certain CAFOs to be exempt from permitting and, as in this case, "challenges to the types of discharges subject to regulation." Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 495-98, 504-506 (2d Cir. 2005).

The Fifth Circuit more recently considered consolidated challenges to the CAFO Rule that EPA promulgated following the Second Circuit's remand decision in Waterkeeper. Nat'l Pork Producers Council, 635 F.3d 738. In that case, the court analyzed EPA's permitting regulations that identify the types of dischargers or activities that require an NPDES permit. 635 F.3d at 749-51. The court also dismissed petitions for review of guidance letters that stated that releases of dust from poultry houses would require a permit, on the grounds that the letters were not final agency action rather than because the court found the action to be beyond the scope of its jurisdiction under Section 509(b)(1). 635 F.3d at 754-56; cf. Texas Indep. Producers & Royalty Owners Ass'n v. EPA, 413 F.3d 479, 480-84 (5th Cir. 2005) (dismissing a petition for review of an EPA rule postponing the requirement for applying for an NPDES permit for oil and gas construction activities – not

because the court lacked original subject matter jurisdiction, but because the case was not yet ripe for review).

As these circuit court cases demonstrate, applying a practical construction to Section 509(b)(1)(F) allows for the "clear and orderly process for judicial review" intended by Congress, see H.R. Rep. No. 92-911, at 136 (1972), where parties may dispute not only the grant or denial of a permit, but also EPA's rules specifying which activities are subject to the permitting process.

Contrary to Friends of the Everglades' contention (Friends of the Everglades Br. at 36-37), EPA's position is not contrary to that taken by the Agency in moving to dismiss the petitions for review of an amended determination by EPA with respect to water quality standards in the Everglades. In EPA's motion to dismiss the petitions for review of the Amended Determination, the Agency specifically pointed out that the Amended Determination did not constitute final agency action with respect to any of the existing NPDES permits for discharges to the Everglades. Friends of the Everglades Br., Add. S at 18-19.[18/] Moreover, in the

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[18/] In addition, EPA's motion to dismiss cited by Friends of the Everglades specifically noted examples of EPA actions reviewable under Section 509(b)(1)(E), including the establishment of industry-wide regulations imposing effluent limitations, E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 136-37; 97 S. Ct. 965, 979 (1977), the establishment of area-wide regulations for determining effluent limitations, Am. Iron & Steel Inst. v. EPA, 115 F.3d 979, 986 (D.C. Cir.

(continued...)

challenged amended determination, EPA was not alleged to have issued or denied a permit, nor alleged to have promulgated an effluent or other limitation, much less alleged to have promulgated any regulation regarding either such action as identified in CWA Section 509(b)(1)(E) or (F).

This case demonstrates how circuit courts are better able to consolidate challenges to permit regulations, especially where the regulation has a national impact. Here, the Judicial Panel for Multidistrict Litigation has ordered that all petitions challenging this rule be transferred to one circuit, this Court. See supra pp. 10-11 & tab C. Rather than have separate district courts throughout the United States review the Water Transfers Rule, after which time separate circuit courts might hear appeals of those cases, the matter should be resolved in the first instance by this Court to maximize national uniformity.[19/]

[18/](...continued)
1997), and the establishment of procedural NPDES permitting regulations. NRDC v. EPA, 673 F.2d at 405 n.15.

[19/] Parallel actions for judicial review of the Water Transfers Rule in district courts in Florida and New York have been stayed, pending this Court's decision. See supra p. 11 n.9.

B. Review Also Lies in this Court under Section 509(b)(1)(E), Relating to Effluent Limitations or Other Limitations

This Court also has jurisdiction under Section 509(b)(1)(E) of the CWA, which applies to EPA actions "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 [Sections 301, 302, 306 or 405 of the CWA]." 33 U.S.C. § 1369(b)(1)(E). The CWA defines "effluent limitation" as "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." 33 U.S.C. § 1362(11). However, the jurisdictional provision, which also applies to "other limitation[s]," a term not defined by the CWA, must be interpreted more broadly to include things other than effluent limitations. See, e.g., NRDC, 673 F.2d at 402-03 (establishing circuit court's original jurisdiction to review consolidated permit regulations establishing procedures for issuing or denying NPDES permits).

The courts of appeals have original jurisdiction over actions closely related to the approval or promulgation of effluent limitations or other limitations. See, e.g., Maier v. EPA, 114 F.3d 1032, 1037-38 (10th Cir. 1997) (EPA decision not to

revise sewage treatment regulations); NRDC, 673 F.2d at 402-03 (regulations establishing procedures for issuing or denying permits, and who may utilize those procedures); NRDC v. EPA, 656 F.2d 768, 774-75 (D.C. Cir. 1981) (regulations establishing criteria, standards, and process for requests for modification to sewage treatment requirements); Riverkeeper, Inc., 358 F.3d at 183, 185-86. (regulations addressing intake structures used to withdraw water for cooling purposes rather than discharges of pollutants to water). Here, the Water Transfers Rule relates to "other limitations" to the extent that the Water Transfers Rule sets forth limits on which movements of water are, and which are not, subject to NPDES permitting. Thus, the Rule explains, in part, the scope of activities that are subject to NPDES requirements and thus falls within the scope of Section 509(b)(1)(E).

Review in this Court is also proper because the Water Transfers Rule establishes "limitations" on permit issuers. In NRDC, the D.C. Circuit found that it had original jurisdiction to hear a petition challenging EPA's Consolidated Permit Regulations ("CPRs"), which do "not set any numerical limitations on pollutant discharge," but are a "set of procedures for issuing or denying NPDES permits." NRDC, 673 F.2d at 402. The court concluded it had jurisdiction in part because the procedures for issuing or denying permits were "a limitation on point sources and permit issuers." Id. at 405 (emphasis added) (citation omitted). The

court also noted that it need not decide whether the CPRs were "effluent limitations" or "other limitations" because "§ 509(b)(1)(E) provides for [court of appeals] review of both effluent limitations and other limitations." Id. at 404 n.11. The Water Transfers Rule is likewise a limitation on permit issuers in that it provides that no permits are required for certain activities, thus distinguishing them from activities that will require a permit.

Friends of the Everglades note that EPA has successfully argued that Total Maximum Daily Loads ("TMDLs") are not reviewable in the first instance in circuit courts. Friends of the Everglades Br. at 39-41. However, that point is irrelevant here, as TMDLs are in no way comparable to the Water Transfers Rule. First, TMDLs are approved or issued under Section 303 of the CWA, which is not among the CWA provisions specifically identified in Subsection 509(b)(1)(E). Longview Fibre Co. v. Rasmussen, 980 F.2d 1307, 1310-13 (9th Cir. 1992). In contrast, Subsection 509(b)(1)(E) does list the statutory provisions applicable to the prohibition against unpermitted discharges, i.e., Section 301(a) of the CWA, 33 U.S.C. § 1311(a), which in turn refers to Section 402 of the CWA, 33 U.S.C. § 1342, the NPDES permit program. Moreover, TMDLs are established for specific waterbodies or portions of waterbodies. See 33 U.S.C. § 1313(d). In contrast, EPA's regulatory interpretation of the CWA in the Water Transfers Rule

is a decision with national implications. The rule is nationally-applicable, and was promulgated following the submission of comments from commenters located in all parts of the United States. "National uniformity . . . is best served by initial review in a court of appeals." NRDC v. EPA, 673 F.2d at 405 & n.15.

C. To the Extent Section 509(b)(1) Is Unclear, Prior Judicial Decisions Favor Jurisdiction in this Court

Although Section 509(b)(1) was intended to "establish a clear and orderly process for judicial review" of key EPA decisions implementing the CWA, see H.R. Rep. No. 92-911 at 136, courts generally have not viewed the provision as a model of clarity. See, e.g., Longview Fibre Co., 980 F.2d at 1309 (describing the review provision as "gnarled"). However, "when there is a specific statutory grant of jurisdiction to the court of appeals, it should be construed in favor of review by the court of appeals." NRDC v. Abraham, 355 F.3d 179, 193 (2d Cir. 2004) (citing Second, Seventh, Tenth, and D.C. Circuit cases). Thus, to the extent there may be ambiguity as to whether original jurisdiction lies with the district court or the court of appeals, courts "must resolve that ambiguity in favor of review by a court of appeals." Nuclear Info. & Res. Serv. v. DOT Research & Special Programs Admin., 457 F.3d 956, 960 (9th Cir. 2006) (quoting Suburban O'Hare Comm'n v. Dole, 787 F.2d 186, 192 (7th Cir. 1986)); see also Florida Power & Light, 470 U.S.

at 744-45, 105 S. Ct. at 1607.

Accordingly, this Court has jurisdiction under Section 509(b)(1) of the CWA, 33 U.S.C. § 1369(b)(1).

II. *FRIENDS I* RESOLVED THE VALIDITY OF THE WATER TRANSFERS RULE

Friends I resolved the validity of the Water Transfers Rule. This is because: (a) under the prior panel rule the Court is bound by the holding of Friends I that EPA's interpretation of the CWA is reasonable and controlling under Chevron; (b) EPA based the Rule on a legal interpretation of the CWA, not any administrative record-based factual conclusion; and (c) Petitioners' arguments that the administrative record does not support the Rule have no bearing on the Rule's validity.

A. Under the Prior Panel Rule, the Court is Bound by *Friends I*

"[I]t is the firmly established rule of this Circuit that each succeeding panel is bound by the holding of the first panel to address an issue of law, unless and until that holding is overruled en banc, or by the Supreme Court." Hogan, 986 F.2d at 1369. Just so here; Friends I renders meritless any dispute about whether the Water Transfers Rule, "which accepts the unitary waters theory that transferring pollutants between navigable waters is not an 'addition . . . to

navigable waters,'" is a "reasonable, and therefore permissible, construction of the [statutory] language." 570 F.3d at 1227-28. As the Court held, "[b]ecause the EPA's construction is one of two readings we have found is reasonable, we cannot say that it is 'arbitrary, capricious, or manifestly contrary to the statute.'" Friends I, 570 F.3d at 1228 (quoting Chevron, 467 U.S. at 844). Further, as the Court concluded, "[u]nless and until the EPA rescinds or Congress overrides the regulation, we must give effect to it." Id.

Although State Petitioners believe that Friends I was "decided incorrectly," States Br. at 14, they "acknowledge that the Court is bound by its ruling in [Friends I] that the Water Transfers Rule is a permissible construction of the Act." States Br. at 14; see also id. at 24-24. The Tribe offers no such concession. It instead asserts: "EPA's interpretation of the word addition is unreasonable," Tribe Br. at 13; "Congress intended for the EPA to consider environmental impacts that the rule would have," id. at 14; "EPA's rule is . . . in direct conflict with Congressional intent," id.; and "EPA's Rule is not due deference under Chevron . . . ." Tribe Br. at 29. Under the prior panel rule, these arguments are unavailing.

B. EPA Based the Water Transfers Rule on its Interpretation of the CWA

Without question, EPA based the Water Transfers Rule on its legal interpretation of the CWA, not any record-based factual conclusion. See 73 Fed.

Reg. at 33,700-03 (rationale accompanying the final rule); 71 Fed. Reg. at 32,889 (rationale accompanying the proposed rule); AR 0005, pp. 4-15 (August 2005 interpretative memorandum).

In the preamble, for example, EPA explained that "[t]he legal question addressed by today's rule is whether a water transfer . . . constitutes an 'addition' within the meaning of section 502(12)," 33 U.S.C. § 1362(12)(A). 73 Fed. Reg. at 33,700. EPA continued:

> The statute defines "'discharge of a pollutant'" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). When the statutory definition of "'navigable waters'" – i.e., "the waters of the United States," 33 U.S.C. § 1362(7) – is inserted in place of "navigable waters," the statute provides that NPDES applies only to the "addition of any pollutant to the waters of the United States." Given the broad definition of "pollutant," transferred (and receiving) water will always contain intrinsic pollutants, but the pollutants in transferred water are already in "the waters of the United States" before, during, and after the water transfer. Thus, there is no "addition"; nothing is being added "to" "the waters of the United States" by virtue of the water transfer, because the pollutant at issue is already part of "the waters of the United States" to begin with. Stated differently, when a pollutant is conveyed along with, and already subsumed entirely within, navigable waters and the water is not diverted for an intervening use, the water never loses its status as "waters of the United States," and thus nothing is added to those waters from the outside world.

73 Fed. Reg. at 33,701 (emphasis added) (quoting the United States' brief in Friends I). In other words, as the Court summarized, "EPA's regulation . . . accepts the unitary waters theory that transferring pollutants between navigable waters is not an 'addition . . . to navigable waters[.]'" Friends I, 570 F.3d at 1227.

EPA examined other provisions of the CWA as well, particularly: Section 101(g), 33 U.S.C. § 1251(g),[20/] which "establishes . . . Congress's general direction against unnecessary Federal interference with State allocations of water rights," 73 Fed. Reg. at 33,702; Section 510, 33 U.S.C. § 1370,[21/] which "supports the notion

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[20/] Section 101(g) provides:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA]. It is the further policy of Congress that nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

33 U.S.C. § 1251(g).

[21/] Section 510 provides:

> Except as expressly provided in [the CWA], nothing [in the CWA] shall . . . be construed as impairing or in any

(continued...)

that Congress did not intend administration of the CWA to unduly interfere with water resource allocation," 73 Fed. Reg. at 33,702; and Section 304(f)(2)(F), 33 U.S.C. § 1314(f)(2)(F),[22/] which "reflects an understanding by Congress that water movement could result in pollution, and that such pollution would be managed by States under their nonpoint source program authorities, rather than the NPDES program." 73 Fed. Reg at 33,702. The collective legal import of these provisions, EPA reasonably concluded, is that "water transfers . . . do not constitute an

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[21/](...continued)

> manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

33 U.S.C. § 1370.

[22/] Section 304(f)(2)(F) provides, in pertinent part:

> The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall issue to appropriate Federal agencies, the States, water pollution control agencies, and agencies designated under [33 U.S.C. § 1288] . . . information including (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from . . . changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

33 U.S.C. § 1314(f)(2)(F).

'addition' to navigable waters to be regulated under the NPDES program." 73 Fed. Reg. at 33,703.

C. Petitioners' Arguments That the Administrative Record Does Not Support the Rule Have No Bearing on the Rule's Validity

None of Petitioners' arguments has any bearing on the validity of the Water Transfers Rule as established in Friends I. Petitioners offer no serious argument that EPA failed to follow notice-and-comment procedures associated with informal rulemaking. E.g., Tribe Br. at 30-31 (stating that "EPA went through the motions of complying with the procedural requirements," while asserting, without elaboration or support, that "EPA failed to comply with the procedural requirements of formal rulemaking").[23/] Instead, Petitioners challenge the adequacy of EPA's response to comments and argue that the Rule is not supported by the administrative record.[24/] Although Petitioners' arguments are without merit, as we explain infra pp. 45-56, the Court need not reach these arguments because

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[23/] Procedures associated with informal rulemaking are set forth in 5 U.S.C. § 553. Procedures associated with formal rulemaking do not apply here (and rarely do). See 5 U.S.C. § 553(c) ("When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection."); Florida Manufactured Housing Ass'n v. Cisneros, 53 F.3d 1565, 1572 (11th Cir. 1995) (discussing informal and formal rulemakings).

[24/] Only Friends of the Everglades and the Tribe assert that the Rule is infirm for record-related reasons. State Petitioners offer no record-related arguments.

they are immaterial on their face.

The Court has already reviewed, and upheld, relevant portions of the administrative record, that is, key documents where EPA espoused its interpretation of the CWA as not requiring NPDES permits for water transfers. The Court quoted from the preamble accompanying the promulgation of the Water Transfers Rule, 570 F.3d at 1218-19 (citing 73 Fed. Reg. 33,697-708 (June 13, 2008)). The preamble is EPA's final decision document and it sets forth not only EPA's reasoning, but also a summary of its response to comments.[25/] Also part of the record on appeal in Friends I was EPA's August 2005 interpretive memorandum, which the Court referenced as "EPA's 2005 guidance letter." Friends I, 570 F.3d at 1222; see also id. at 1216 n.4 (referencing EPA's "opinion letter").[26/] And, because the district court reviewed EPA's interpretation of the CWA as set forth in the proposed rule, 2006 WL 3635465, at *34-36 & 34 n.51 (citing 71 Fed. Reg. at 32,887-89), this portion of the administrative record was also part of the record on appeal in Friends I.[27/]

[25/] The preamble is in the administrative record at AR 1417.

[26/] The interpretative memorandum is in the administrative record at AR 0005.

[27/] The proposed rule is in the administrative record at AR 0001.

Contrary to the Tribe's assertion (Tribe Br. at 39), the Court in Friends I was under no obligation to consider additional portions of the administrative record. Friends I was a citizen suit CWA enforcement action against state defendants, not an APA challenge to the Water Transfers Rule. Moreover, courts need not consider a complete administrative record to apply Chevron. There are numerous examples where, in non-APA suits, the Supreme Court and this Court have accorded Chevron deference to an agency regulation without having before it the full administrative rulemaking record. E.g., Yellow Transp., Inc. v. Michigan, 537 U.S. 36, 45, 123 S. Ct. 371, 377 (2002); Atlantic Mut. Ins. Co. v. C.I.R., 523 U.S. 382, 387-391, 118 S. Ct. 1413, 1417-18 (1998); Smiley v. Citibank, 517 U.S. 735, 738-746, 116 S. Ct. 1730, 1732-36 (1996); Russell v. North Broward Hosp., 346 F.3d 1335, 1344-45 (11th Cir. 2003). As the Fifth Circuit explained in Sierra Club v. U.S. Fish and Wildlife Service, 245 F.3d 434, 441 n.37 (5th Cir. 2001), under Chevron "[o]ur review is limited to interpreting the extent to which the regulation is consistent with the statute – a task which we are competent to perform without the administrative record."

Although the APA informs any judicial review of the Water Transfers Rule in the present case, see supra pp. 15-16, Friends of the Everglades and the Tribe incorrectly assume that the Court is obligated to assess the validity of the Rule

anew in light of the full administrative record (Tribe Br. at 36, 38, 39; Friends of the Everglades Br. at 43). No such obligation exists. The APA states that courts "shall review the whole record or those parts of it cited by a party," but it also preserves courts' traditional discretion to address only "relevant questions of law" and only "[t]o the extent necessary to decision[.]" 5 U.S.C. § 706. As the Supreme Court has summarized the standard of review, "[a] reviewing court reviews an agency's reasoning to determine whether it is arbitrary or capricious, or, if bound up with a record-based factual conclusion, to determine whether it is supported by substantial evidence." Dickinson, 527 U.S. at 164, 119 S. Ct. at 1823 (emphasis added; internal quotation marks omitted).

Here, because EPA's reasoning was not bound up with any administrative record-based factual conclusion, the only material question regarding the Rule's validity is whether EPA's reasoning was arbitrary and capricious. In Friends I, the Court examined all portions of the record necessary to resolve that question. 570 F.3d at 1210 ("Because EPA's construction . . . is reasonable, we cannot say that it is 'arbitrary, capricious, or manifestly contrary to the statute.'") (quoting Chevron, 467 U.S. at 844, 104 S. Ct. at 2782). No further review is required to deny the petitions for review; the Water Transfers Rule is valid "[u]nless and until the EPA rescinds or Congress overrides the regulation." Friends I, 570 F.3d at 1210.

III. EPA ACTED LAWFULLY AND REASONABLY IN PROMULGATING THE WATER TRANSFERS RULE

To the extent that Friends I did not resolve the validity of the Water Transfers Rule – for example, because the Court believes it "necessary to decision," 5 U.S.C. § 706, to consider portions of the administrative record that were not part of the record in Friends I, such as EPA's Comment Response Document (AR 1428) – Friends of the Everglades' and the Tribe's record-based arguments are without merit. The standard of review is highly deferential to the agency, e.g., North Buckhead Civic Ass'n v. Skinner, 903 F.2d 1533, 1538-39 (11th Cir. 1990) ("Along the standard of review continuum, the arbitrary and capricious standard gives an appellate court the least latitude in finding grounds for reversal.") (footnote omitted), and the record shows that EPA acted lawfully and reasonably in promulgating the Water Transfers Rule.

A. Friends of the Everglades' Arguments are Without Merit

Friends of the Everglades acknowledge that most of the thousands of water transfers in the United States are not associated with any substantial impairment of water quality. See Friends of the Everglades Br. at 46. At the same time, Friends of the Everglades assert that EPA "premised" the Water Transfers Rule on the conclusion that "exempting water transfers would not affect the legal powers of

states to remedy contamination of their waters resulting from water transfers in upstream states." Friends of the Everglades Br. at 43-44. No such premise exists, however. The premise of the Water Transfers Rule is that Congress did not intend to subject to the NPDES permit program the mere conveyance of water from navigable waters to navigable waters. EPA restated that in the record in response to this very comment. AR 1428, p. 33 ("[S]ince water transfers are not additions they are not a discharge that would be covered under the NPDES program."). Furthermore, as EPA explained, codifying "EPA's longstanding practice of not requiring NPDES permits for water transfers" "does not promote adding pollution to any waters[,]" AR 1428, p. 32, including international and interstate "boundary waters," consistent with Section 510 of the CWA, 33 U.S.C. § 1370; see supra pp. 39-40 & n.21.[28/]

Next, Friends of the Everglades challenge EPA's conclusion that "[o]ther federal and state laws provide a sufficient regulatory framework to address any water quality impacts related to water transfers." Friends of the Everglades Br. at

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[28/] States similarly have a longstanding practice of not requiring NPDES permits for water transfers. As EPA explained, only the Commonwealth of Pennsylvania had a contrary practice. 73 Fed. Reg. at 33,699; AR 1428, p. 9. Although Pennsylvania's Department of Environmental Protection initially petitioned for review of the Water Transfers Rule (Appeal No. 09-10506), it has since sought and received a voluntary dismissal.

46 (quoting AR 1428, p. 31). The conclusion is neither arbitrary nor capricious. EPA correctly explained that the Rule has no effect on the NPDES program's coverage of activities that add pollutants from the outside world to navigable waters. See, e.g., AR 1428, p. 32 ("[P]ollutants discharged from permitted point sources upstream of the intake for the water transfer may subsequently be moved through a water transfer to the receiving waterbody. But such discharges are already permitted and must meet all applicable effluent limitations and water quality criteria."); AR 0005, p. 7 ("Discharges of pollutants covered by section 402 are subject to 'effluent' limitations."). That is, with or without the Water Transfers Rule, the NPDES permit program regulates discharges of pollutants from point sources upstream of the water transfer facility, and state NPDES permitting authorities retain their ability to subject the discharger to stringent limits or even prohibit the discharge altogether. See 73 Fed. Reg. at 33,704 ("States may not exclude from NPDES permit requirements sources that are point sources under Federal law, including those that do not meet the definition of a water transfer in today's rule.").

Similarly, with or without the Water Transfers Rule, the NPDES program does not apply to non-point sources. See Friends I, 570 F.3d at 1226-27 ("Non-point source pollution, chiefly runoff, is widely recognized as a serious water

quality problem, but the NPDES program does not even address it."). Instead, the CWA encourages states to address non-point sources of pollution through state and local programs such as land use requirements or best management practices. See, e.g., 33 U.S.C. §§ 1288(b)(2)(F) (land use planning to reduce agricultural non-point sources of pollution); 1329 (non-point source management programs); 1314(f)(2)(F) (issuance of guidelines and methods to control non-point sources, including changes in water movement or flow). Those programs can be used to improve the quality of the water being transferred, as EPA noted in the record. See 73 Fed. Reg. at 33,702 (where pollutants enter the waters of the United States through non-point sources unassociated with water transfer facilities, "pollution from transferred waters is more sensibly addressed through water resource planning and land use regulations, which attack the problem at its source.").

The record also shows that EPA considered potential water quality impacts arising from the management of water resources, including water transfers. EPA's assessment was that "Congress intended to leave oversight of water transfers, and any potential environmental effects they may have, to water resource management agencies and the States in cooperation with Federal authorities." AR 1428, p. 31. This explanation is supported, for example, by Section 101(g) of the CWA, which instructs: "Federal agencies shall co-operate with State and local agencies to

develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources." 33 U.S.C. § 1251(g); see also supra p. 39 & n.20. Moreover, as the Court explained in Friends I: "[I]t may seem inconsistent with the lofty goals of the Clean Water Act to leave out of the permitting process the transfer of pollutants from one navigable body of water to another, but it is no more so than to leave out all non-point sources . . . . Yet we know the Act does that." 570 F.3d at 1227.

EPA's rationale for promulgating the Water Transfers Rule does not hinge on the adequacy of any particular program in any particular state, as Friends of the Everglades suggest. Rather, EPA "recognize[d] that State water allocation laws or water resource plans have specific objectives and can be limited in their scope," and EPA did not anticipate that "such laws or plans alone would be the only mechanisms available to protect water quality." AR 1428, pp. 18-19. The point of EPA's reference to other provisions of the CWA and other federal and state laws was that a "regulatory framework" exists, AR 1428, p. 31; that is, "water quality may be protected by the full suite of applicable federal and State requirements designed to achieve and protect water quality." AR 1428, p. 19 (emphasis added). As EPA made clear, the Rule in no way diminishes the States' authority, preserved under Sections 101(b) and 510 of the CWA, 33 U.S.C. §§ 1251(b) and 1370, to

demand permits for water transfers outside the context of the NPDES permit program. See 73 Fed. Reg. at 33,706 ("[S]tates currently have the ability to address potential in-stream and/or downstream effects of water transfers through their [water quality standards] and TMDL programs and pursuant to state authorities preserved by section 510, and today's rule does not have an effect on these state programs and authorities."); AR 1428, p. 19 (States' authority to demand non-NPDES permits for water transfers "is not diminished by today's rule"). It was reasonable for EPA to find the existence of other authorities, not the extent to which they are being exercised in any particular setting, more indicative of congressional intent concerning the applicability of the NPDES permit program to water transfers. See, e.g., AR 1428, p. 7 ("[T]he relative quality of the donor water and the receiving water is not relevant to the statutory interpretation of 'addition' embodied in [the Water Transfers Rule]."); AR 0005, p. 7 ("Congress was aware that there might be pollution associated with water management activities, but chose to defer to comprehensive solutions developed by State and local agencies for controlling such pollution.").

Friends of the Everglades' third and final contention is that EPA "arbitrarily rejected" an approach of having the Water Transfers Rule provide that water transfers are not subject to the NPDES permit program except where they "cause

grave pollution problems." Friends of the Everglades Br. at 44. See also id. at 30, 47-48. EPA reasonably declined to require NPDES permits for water transfers on a case-by-case basis. The record contains a number of comments about this approach, and "[t]he most frequently cited reason for opposing [it] was a belief that the Clean Water Act provides no authority to regulate water transfers on a case-by-case basis." 73 Fed. Reg. at 33,706. It was reasonable for EPA to be persuaded by those comments. See id. ("EPA has decided not to include a mechanism in [the Water Transfers Rule] for the permitting authority to designate water transfers on a case-by-case basis as needing an NPDES permit. This conclusion is consistent with EPA's interpretation of the CWA as not subjecting water transfers to the permitting requirements of section 402."); AR 1428, p. 26 (same); see also AR 1428, p. 13 ("EPA believes that an addition of a pollutant under the Act occurs when pollutants are introduced from outside the waters being transferred.").

The reasonableness of EPA's response is further supported by Friends I. As the Court found,

> There are two reasonable ways to read the § 1361(12) language "any addition of any pollutant to navigable waters from any point source." One is that it means "any addition . . . to [any] navigable waters;" the other is that it means "any addition . . . to navigable waters [as a whole]."

570 F.3d at 1227 (brackets in original). The Court never suggested that there is a third way to read the statutory language, i.e., that the statutory language may be read differently on a case-by-case basis. But even if the statutory language could reasonably be interpreted in the manner Friends of the Everglades suggest, their argument fails. E.g., Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498, 1505 (2009) (agency's reasonable interpretation prevails even if it is not the only possible interpretation or the one deemed most reasonable by the courts); Sierra Club v. Admin'r, EPA, 496 F.3d 1182, 1186 (11th Cir. 2007) ("Under Chevron deference, we must accept an agency's reasonable interpretation of an ambiguous statute, 'even if the agency's reading differs from what the court believes is the best statutory interpretation'."). To prevail, Friends of the Everglades must show that the statute unambiguously compels their interpretation as the only permissible reading. As the Court held in Friends I, even if it was one reasonable interpretation, it is certainly not the only permissible reading.

B. The Tribe's Arguments Are Without Merit

Nothing in the Tribe's brief establishes that the Water Transfers Rule is unlawful or unreasonable.

First, the Tribe argues that EPA failed to meaningfully consider comments about the Rule's "impacts . . . on the Tribal members and their Everglades

homeland." Tribe Br. at 31. The record contradicts this assertion. EPA reconciled its legal interpretation of the CWA with restoration of the Everglades. As EPA explained, restoration efforts depend heavily on the "quantity, timing and distribution of water transfers," and "[i]nterference in the State allocation of water resources for environmental restoration is an example of the types of situations that this rule seeks to avoid." AR 1428, p. 33. See generally Miccosukee Tribe of Indians v. U.S. Army Corps of Eng'rs, 619 F.3d 1289, 1293 (11th Cir. 2010) (discussing one element of the Comprehensive Everglades Restoration Plan, improving the flow of water underneath a highway, the Tamiami Trail, which "acts as a dam to restrict water from flowing south into Everglades National Park and greatly reduces the flow into the Shark River Slough, the main water corridor of the Everglades"); United States v. S. Fla. Water Mgmt. Dist., 847 F. Supp. 1567, 1569 (S.D. Fla. 1992) (involving an action brought by the United States against the South Florida Water Management District and the Florida Department of Environmental Regulation alleging, among other things, that those agencies allowed phosphorous-polluted water to be diverted into the Everglades National Park in violation of state law and federal contracts), aff'd in part and rev'd in part, 28 F.3d 1563 (11th Cir. 1994).

The Tribe also contends that EPA "failed to respond to the Tribe's contention that the proposed rule could adversely impact tribal governments by attempting to transfer all the costs of regulating other parties' pollution that might reach tribes on to tribes." Tribe Br. at 33. The comment was not unique; others offered similar comments. See 73 Fed. Reg. at 33,708. As EPA responded, it did not analyze the effect of the Rule "on the costs of drinking water treatment, recreation, or commercial fishing" because the Rule "is based principally on an analysis of the language, structure, and legislative history of the Clean Water Act[.]" AR 1428, p. 30. EPA further noted that because the Rule codified the Agency's longstanding practice of not requiring NPDES permits for water transfers, "it is not clear that the rule imposes any costs on any entities." Id.

Similarly, and contrary to the Tribe's next assertion (Tribe Br. at 34), it was reasonable for EPA to conclude that Executive Order 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000), did not apply to the promulgation of the Water Transfers Rule. 73 Fed. Reg. at 33,707. Under the Executive Order, EPA is to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." Id. As EPA explained, the Rule does not have tribal implications because "[i]t will neither impose substantial direct compliance costs on tribal governments, nor preempt

Tribal law." Id.; see also AR 1428, p. 56 ("[T]his rule . . . will not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes."). Under the Rule, the Tribe remains free to "exercis[e] its own authority" to address pollution within its jurisdiction. 33 Fed. Reg. at 33,707; AR 1428, p. 56. Further, as EPA stated, it "continues to pursue programs rather than the NPDES permit program to eliminate non-point source water pollution upstream of water transfers." AR 1428, p. 56.

Likewise, there is no merit to the Tribe's argument that EPA failed to conduct the consultation required by the Executive Order. "EPA specifically solicited additional comments on the proposed rule from tribal officials." 73 Fed. Reg. at 33,707. EPA also extended the normal comment period. 71 Fed. Reg. 41,752 (July 24, 2006); AR 0308. And, as a practical matter, the Tribe "had sufficient time to prepare comments on the proposed rule because the rule was based on the August 5, 2005 interpretative memorandum, which had been made available for almost a year by the time the Agency proposed the rule." AR 1428, p. 56.[29/]

[29/] Indeed, by virtue of its status as a party in Friends I, the Tribe was served with a copy of the interpretative memorandum the same day EPA issued and presented it

(continued...)

In any event, none of the Tribe's arguments concerning Executive Order 13,175 can provide it any relief in this case. The Executive Order does not "create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person." 65 Fed. Reg. at 67,252 (quoting Section 10 of the Executive Order).[30/]

Accordingly, with or without the Court's consideration of Petitioners' record-related arguments, EPA acted lawfully and reasonably in promulgating the Water Transfers Rule.

[29/](...continued)
to the district court. See supra p. 8.

[30/] The Tribe contends that EPA failed to respond to its assertion that the Agency should have consulted with the Fish and Wildlife Service about the Rule under the Endangered Species Act. Tribe Br. at 34 n.4. The contention is baseless. EPA had no duty to consult, where, as here, it did not propose to "authorize[], fund[], or carr[y] out" any action, let alone any action that could jeopardize an endangered species. 16 U.S.C. § 1536(a)(2); Loggerhead Turtle v. County Council of Volusia County, Fla., 148 F.3d 1231, 1246 (11th Cir. 1998). As EPA explained in its response to this comment, "[i]n the absence of this rule, the scope of the NPDES permitting requirement would be the same as under the rule. EPA's interpretation of the law . . . is a legal one based on the CWA and Congressional intent." AR 1428, p. 54. In addition, as EPA noted, "any impacts that might ultimately be attributable to this rule are at best speculative ones." Id.

CONCLUSION

For the foregoing reasons, the Court has jurisdiction over these consolidated petitions for review of the Water Transfers Rule, and the petitions should be denied.

Respectfully submitted,

Dated: October 27, 2011

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CERTIFICATE OF COMPLIANCE

1. This brief contains 13,466 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and therefore complies with the type-volume requirements of Fed. R. App. P. 32(a)(7)(B)(i), which provides, in pertinent part, that "[a] principal brief is acceptable if it contains no more than 14,000 words."

2. This brief has been prepared in proportionally-spaced typeface using Word Perfect X3 in 14-point Times-Roman font.

Dated: 10/27/2011

___/s/ Andrew J. Doyle_____
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United States Department of Justice
Environment & Natural Resources Division

INDEX TO ADDENDUM

GLOSSARY

APA	Administrative Procedure Act
AR	Administrative Record
CAFO	Concentrated Animal Feeding Operations
CWA or the Act	Clean Water Act, 33 U.S.C. §§1251-1387
EPA	Respondents United States Environmental Protection Agency and its Administrator
Friends I	Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist., 570 F.3d 1210 (11th Cir. 2009), rehearing en banc denied, 605 F.3d 962 (11th Cir.), cert. denied, 131 S. Ct. 643 (2010)
Friends of the Everglades Br.	Corrected Initial Brief for Friends of the Everglades, Florida Wildlife Federation, Sierra Club, and Environmental Confederation of Southwest Florida (Aug. 26, 2011)
NPDES	National Pollutant Discharge Elimination System
States Br.	Brief for States of New York, Connecticut, Delaware, Illinois, Maine, Michigan, Minnesota, Missouri, Washington, and Government of the Province of Manitoba, Canada (Aug. 11, 2011)
Tribe Br.	Initial Brief of Petitioner Miccosukee Tribe of Indians of Florida (Aug. 13, 2011)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

08-13652-CC, 08-13653-CC, 08-13657-CC,
08-14921-CC, 08-16270-CC 08-16283-CC, & 09-10506-CC

FRIENDS OF THE EVERGLADES,
MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,
ET AL.,

Petitioners,

versus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
CAROLE WEHLE,
UNITED STATES SUGAR CORPORATION,

Intervenors.

On Petitions for Review of a Final Rule of the
United States Environmental Protection Agency

BEFORE HULL, WILSON, and PRYOR, Circuit Judges.

BY THE COURT:

Pursuant to the Court's November 14, 2008 order, these consolidated petitions for review of the Respondent Environmental Protection Agency's ("EPA") Water Transfers Rule were stayed pending issuance of the mandate in Appeal No. 07-13829. The Court's decision in that appeal is now final, and the mandate issued on December 2, 2010. See Friends of the Everglades v. S. Fla. Water Mgmt. Dist., 570 F.3d 1210 (11th Cir. 2009), rehearing en banc denied, 605 F.3d 962 (11th Cir. 2010), cert. denied, _ U.S. _, 131 S. Ct. 643 (2010) ("FOTE I").

Now before the Court are (1) Respondent EPA's motion for summary denial of the petitions for review, based on FOTE I; (2) various parties' motions to dismiss the petitions for review for lack of original subject matter jurisdiction in this Court; (3) various Petitioners' motions to "remand" the petitions to the district court;[1] and (4) several procedural motions.

We address the procedural motions first.

The February 5, 2009 motion filed by the States of Colorado, et al., for reconsideration of the January 15, 2009 denial of their motion to intervene as a respondent in Appeal No. 08-16283, as renewed and supplemented on January 14,

[1] We construe the motions for "remand" to the district court in the Southern District of Florida as motions to transfer the petitions for review, filed in this Court, to that district court pursuant to 28 U.S.C. § 1631. Some of the petitions for review were filed in this Circuit; some were filed in several other circuit courts and transferred here by order of the Judicial Panel on Multi-District Litigation ("JPML").

2011, is DENIED.

The motion by the Florida Wildlife Federation to stay consideration of Respondent EPA's motion for summary denial of these petitions is DENIED AS UNNECESSARY, as the Court must always determine its jurisdiction before proceeding to the merits.

We now turn to various parties' motions asking us to dismiss the petitions for review based on lack of original subject matter jurisdiction in this Court. The courts of appeals have original jurisdiction under the Clean Water Act ("CWA") to review certain types of actions by the EPA, as set out in CWA § 509(b)(1), 33 U.S.C. § 1369(b)(1). The Respondent EPA asserts that this Court has subject matter jurisdiction over the petitions for review—challenging the EPA's enactment of the Water Transfers Rule—under the following provisions of § 1369(b)(1):

> Review of the Administrator's action . . . (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of this title . . . may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person.

Id. (emphasis added).[2]

[2] Several Petitioners indicate that they felt obliged to pursue petitions for review in this Court, despite believing that jurisdiction lay in the district court, because the EPA's published

Various moving parties contend that the EPA's Water Transfers Rule does not fall into one of the categories listed in 33 U.S.C. § 1369(b)(1). Compare Nw. Envtl. Advocates v. U.S. Envtl. Prot. Agency, 537 F.3d 1006, 1015-18 (9th Cir. 2008) (rejecting EPA's contention that the exemption in the Water Transfers Rule, as codified at 40 C.F.R. § 122.3(a), was reviewable in court of appeals pursuant to § 1369(b)(1)(E) and/or (F); "categorical and permanent exemptions of three types of discharges from any limit imposed by a permitting requirement" did not involve effluent limitation under one of the specified sections of the CWA, nor was it functionally similar to the issuance or denial of a permit), with Nat'l Cotton Council of Am. v. U.S. Envtl. Prot. Agency, 553 F.3d 927, 932-33 (6th Cir. 2009) (new rule exempting the discharge of certain pesticides from NPDES permit requirements, as codified at 40 C.F.R. § 122.3(h), was a regulation of the underlying permitting procedures, and thus the court of appeals had jurisdiction under § 1369(b)(1)(F) to review the rule).

Because this jurisdictional issue is one of first impression in this Circuit and the other circuits have taken somewhat different approaches, the various parties'

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notice of adoption of the Water Transfers Rule stated "judicial review of the Administrator's action can only be had by filing a petition for review in the United States Court of Appeals within 120 days after the decision is considered issued for purposes of judicial review." See National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33697-01 (June 13, 2008). Although Petitioners have filed petitions in this Court as a protective matter, some Petitioners have also filed in the district court and asserted that, contrary to the Respondent EPA's position, this Court lacks original jurisdiction under 33 U.S.C. § 1369(b)(1).

motions to dismiss these consolidated petitions for review for lack of original subject matter jurisdiction are all DENIED, WITHOUT PREJUDICE to the parties' rights to renew their requests for such dismissal relief in their merits briefs.

Because resolution of the subject-matter jurisdictional issues will not be made until the petitions are fully briefed on the merits, Respondent EPA's motion for summary denial of the petitions is DENIED.[3]

All of the motions to remand or transfer the petitions are also DENIED, WITHOUT PREJUDICE to the parties' rights to renew the request in the merits brief.

The Clerk is directed to issue a briefing schedule for the petitions. The briefs shall address both the jurisdictional and merits issues, and these consolidated petitions shall be scheduled for oral argument after briefing is completed. The Petitioners are given leave to file consolidated briefs and are strongly encouraged to do so.

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[3] We note some Petitioners request remand or transfer to the district court. Other Petitioners oppose that request, contending this Court lacks authority to transfer petitions for review to the district court and that, at a minimum, the petitions transferred here from other circuits by the JPML should not be sent to the district court in the Southern District of Florida. EPA and other respondents oppose any remand or transfer on the ground the petitions are properly before this Court. It is premature to rule on the motions for remand or transfer until this Court rules on the issue of original subject matter jurisdiction under § 1369(b)(1).

UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

JUL 22 2008

FILED
CLERK'S OFFICE

IN RE: ENVIRONMENTAL PROTECTION AGENCY, FINAL RULE: NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) WATER TRANSFERS RULE, 73 FED. REG. 33697, PUBLISHED ON JUNE 13, 2008

Environment America, et al. v. EPA, et al., First Circuit, No. 08-1853)
Catskill Mountains Chapter of Trout Unlimited, Inc., et al. v. EPA, et al., Second Circuit, No. 08-3203)
Friends of the Everglades v. EPA, Eleventh Circuit, No. 08-13652)
Miccosukee Tribe of Indians of Florida v. EPA, Eleventh Circuit, No. 08-13653)
Florida Wildlife Federation, Inc. v. EPA, Eleventh Circuit, No. 08-13657)

RTC No. 100

CONSOLIDATION ORDER

The United States Environmental Protection Agency published an order dated June 13, 2008. On July 22, 2008, the Panel filed, pursuant to 28 U.S.C. § 2112(a)(3), a notice of multicircuit petitions for review of that order. The notice included five petitions for review pending in three circuit courts of appeal as follows: First Circuit, Second Circuit and Eleventh Circuit.

The Panel has randomly selected the United States Court of Appeals for the Eleventh Circuit in which to consolidate these petitions for review.

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. § 2112(a)(3), the above-captioned petitions for review are consolidated in the Eleventh Circuit and that this circuit is designated as the circuit in which the record is to be filed pursuant to Rules 16 and 17 of the Federal Rules of Appellate Procedure.

FOR THE PANEL:

John W. Nichols, Chief Deputy Clerk
Random Selector

Tamika Wimbish, Deputy Clerk
Witness

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

08-13652-CC, 08-13653-CC, 08-13657-CC,
08-14247-CC & 08-14471-CC

FRIENDS OF THE EVERGLADES,
MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,
FLORIDA WILDLIFE FEDERATION, INC.,
ENVIRONMENT AMERICA,
ENVIRONMENT NEW HAMPSHIRE,
CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC.,
THEODORE GORDON FLYFISHERS, INC.,
ET AL.,

Petitioners,

versus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

08-14921-CC

SIERRA CLUB, INC.,
ENVIRONMENTAL CONFEDERATION OF SOUTHWEST FLORIDA,

Petitioners,

versus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for Review of a Final Rule of the
United States Environmental Protection Agency

BEFORE: BLACK and BARKETT, Circuit Judges.

BY THE COURT:

Now before the Court are various motions filed in these petitions, as well as the parties' responses to the September 10, 2008, Order to Show Cause why the petitions for review docketed under Appeal Nos. 08-13652, 08-13653, 08-13657, 08-14247, and 08-14471 (the "Consolidated Petitions) should not be stayed pending disposition of Appeal No. 07-13829.

United States Sugar Corporation's motion to intervene as a respondent in the petition for review docketed as Appeal No. 08-14921 is GRANTED.

The joint motion by the parties to Appeal No. 08-14921 to consolidate that petition with the Consolidated Petitions is GRANTED.

The motion by Northern Colorado Water Conservancy District, et al., for reconsideration of the denial of their motions to intervene in Appeal No. 08-14247 are DENIED. Nothing in the motion for reconsideration demonstrates that the Court

abused its discretion in denying the motions to intervene.

After reviewing the responses to the order show cause, we hereby STAY all further proceedings in these Petitions (including Appeal No. 08-14921) pending disposition and issuance of the mandate in Appeal No. 07-13829.

The joint motion to amend the briefing schedule is DENIED AS MOOT.

CERTIFICATE OF SERVICE

I certify that on this 27th day of October, 2011, I caused a copy of the forgoing **BRIEF FOR RESPONDENTS** to be served by first class U.S. Mail, postage prepaid, on the following counsel for the parties in Appeal Nos. 08-13652, 08-13653, 08-13657, 08-14921, and 08-16283:

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In addition, on this same date, I caused a true and correct copy of the same document to be served by first class U.S. mail, postage prepaid, on the following counsel for persons expressing interest in moving the Court for leave to file amicus briefs:

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Finally, on this date, I caused a courtesy copy of the same document to be transmitted to counsel of record via email.

____/s/_Andrew J. Doyle_____
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